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In the
Supreme Court of the United States

October Term, 1961

No. 463

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SOLOMON DEHYDRATING COMPANY, INCORPORATED,

Petitioner.

vs.

CLARENCE R. GUYTON, CENTRAL GREYHOUND LINES, INC., and GREYHOUND CORPORATION,

Respondents.

—o—

BRIEF OF RESPONDENT THE GREYHOUND CORPORATION IN RESISTANCE TO THE PETITION FOR WRIT OF CERTIORARI

—o—

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This brief is being submitted on behalf of The Greyhound Corporation, one of the respondents, in resistance to the Petition for Writ of Certiorari. Central Greyhound Lines, Inc., and The Greyhound Corporation are one and the same respondent and will be referred to throughout this brief as "Greyhound."

STATEMENT OF THE CASE

As no question has ever been raised about the amount of the verdict returned by the jury in favor of respondent Greyhound, Point 1 of the Statement of the Case, as well as Point I of the Reasons for Granting the Writ, have no application to this respondent. No further reference will be made to either.

The second section of the Statement of the Case makes reference to a Nebraska statute and part of the court's instructions. A significant part was omitted.

After setting forth the language of § 39-729, R. R. S. Nebraska, 1943, Reissue of 1956, the trial court instructed the jury:

> "You are instructed that the statute here requires a driver of a vehicle about to enter a highway protected by stop signs to come to a full stop as near the right-of-way line as possible before driving onto the highway and to give the right of way to vehicles on such highway, regardless of direction, which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed into the intersection.
>
> "The right-of-way line as used in the statute means that portion of the highway set aside for public travel. As applied to this case therefore, bearing in mind that Highway 30 in the area in question is a state and federal highway, and because of the stop sign at the intersection in question, it would be the duty of a driver approaching Highway 30 to come to a full stop as near the curb line—or right-of-way line—as possible before driving onto it and give the right-of-way to vehicles upon the highway until such time, after stopping, as he could drive onto the highway without interfering with the traffic thereon.

"You are further instructed that upon properly complying with the foregoing duties the driver, upon entering the intersection, does not have an absolute right-of-way which permits him to proceed without looking but must continue to maintain a proper lookout for the safety of himself and others traveling upon the highway." (R. pp. 66-67)

ARGUMENT

I.

Point II of Petitioner's Reasons for Granting the Writ has no merit.

Point II of the Petition for Writ of Certiorari relates to what the petitioner contends was a misconstruction of the Nebraska statute relating to the duty of vehicles entering or crossing highways to come to a stop as near the right-of-way line as possible. There are two complete answers to petitioner's contention. First, the trial court's instruction, affirmed by the United States Court of Appeals for the Eighth Circuit, clearly is in accord with the Nebraska law as to the meaning of the term "right of way." Second, as to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari.

(1) In affirming the judgment of the trial court, the Court of Appeals did not render a decision in conflict with the decision of any other circuit with respect to the meaning of the Nebraska statute regulating the duty of motor vehicle operators to bring their vehicles to a stop as near the right-of-way line as possible before entering

or crossing a highway. Nor has petitioner cited any decision which indicates that a contrary interpretation has been placed upon the Nebraska statute. An examination of the decisions of the Nebraska Supreme Court in *Styskal v. Brickey*, 158 Neb. 208, 62 N. W. 2d 854, and *Paddack v. Patrick*, 163 Neb. 355, 79 N. W. 2d 701, clearly demonstrates that the parts of said opinions quoted by the Court of Appeals (Appendix to Petition, pp. 14-15) are not dicta, as contended by the petitioner, but are a material part of the Court's decision. This is particularly true of the decision of the Nebraska Supreme Court in *Paddack v. Patrick, supra*, where, in addition to the language found in the Court of Appeals' opinion, the Nebraska Supreme Court stated:

> " • • • Our statute requires the driver of a vehicle approaching a through highway to stop at the entrance to such highway. Stop signs are usually erected some distance from the entrance to the through highway in order to afford approaching motorists an opportunity to stop before they reach the highway. Where the view of a highway is obstructed at the point where a stop sign is erected, it may not be sufficient to stop where the sign is erected in order to comply with the statute requiring a motorist to stop at the entrance to the highway."

Furthermore, the very construction which petitioner now attacks is the same construction which it placed upon this Nebraska statute when, in its requested instruction No. 8, it asked the trial court to instruct the jury as follows:

> "You are instructed that stop signs are usually erected some distance from the entrance to a through highway in order to afford approaching motorists

time to stop before they reach the highway. It may not be sufficient to stop where the stop sign is erected in order to comply with the statute requiring motorists to stop at the entrance to the highway as near the right-of-way line as possible. * * *"

Rule 19 of the Rules of this Court provides in part as follows:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

From an examination of the opinion, it is clear that the Court of Appeals for the Eighth Circuit has not rendered a decision in conflict with the decision of any other Court of Appeals on the interpretation of the Nebraska

statute in question, nor has it decided an important state or territorial question in conflict with the applicable state or territorial law. On the contrary, the decision rendered by the Court of Appeals is in accord with the applicable decisions of other courts on this question and represents a proper interpretation of the Nebraska statute as interpreted by the decisions of the Nebraska Supreme Court.

(2) Even if there were a conflict as claimed, such a conflict between the circuits on this question would not be grounds for granting a writ of certiorari. Ever since this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, there was bound to arise some difference in the law as announced by the respective Courts of Appeal, depending entirely upon the applicable local law which varies from state to state. In view of this situation, this Court in *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 206, 82 L. Ed. 1290, 58 S. Ct. 860, set forth the following rule:

> " * * * As to questions controlled by state law, however, conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the State.

> "No decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law. * * * "

In a subsequent decision, *Huddleston v. Dwyer*, 322 U. S. 232, 237, 88 L. Ed. 1246, 64 S. Ct. 1015, this Court stated:

> " * * * The decisions of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. Ruhlin v. New York L. Ins. Co., 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860, supra. When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions. * * * "

It is respectfully submitted that nowhere in Point II of the Petition for Writ of Certiorari are there any facts or circumstances which would place this case in that category of exceptional cases referred to by the Court in its opinion in *Huddleston v. Dwyer, supra.* Furthermore, we respectfully submit that, in view of Rule 19, a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor and that counsel for petitioner have failed to state any such special or important reasons which would justify this Court's

taking its time to review the decision of the Court of Appeals.

II.

Point III of Petitioner's Reasons for Granting the Writ has no merit.

Again, it is respectfully submitted that the petitioner has failed completely to cite any decisions of other circuits in conflict with the decision of the Court of Appeals for the Eighth Circuit in this action. A careful reading of the Court's opinion (Appendix to Petition, pp. 4-24) demonstrates beyond question that the Court of Appeals gave full consideration to every point and argument urged by the petitioner and, on the question of the admissibility of the expert testimony of Mr. Weiland, followed the rules of law generally applicable in all the circuits and in the Nebraska State Courts.

Under Rule 19 of the Rules of this Court, it is incumbent upon the petitioner to demonstrate to this Court some special and important reason for granting the writ requested. The only conceivable reason which petitioner can urge with respect to this point is that there is a conflict in the decisions of the circuit courts as to the admissibility of expert testimony. This, we submit, the petitioner has completely failed to do. What he is attacking is not the law applied by the Court of Appeals in affirming the ruling of the trial court, but the Court of Appeals' application of that law to the particular facts developed by the evidence in this case. This, of course, would require a complete review of all the evidence offered at the trial.

From a reading of the opinion of the Court of Appeals for the Eighth Circuit, commencing on page nine of the appendix to the Petition for Writ of Certiorari, it is apparent that the Court of Appeals considered only one vital error in the proposed hypothetical question which rendered it objectionable—that is, the inclusion within the hypothetical of the assumption that "the truck was pushed sideways in an Easterly and Northerly direction for a distance of approximately 110 feet." (R. p. 39.) However, as the Court of Appeals notes in its opinion, other claimed defects in the hypothetical question were urged by both respondents. The inclusion of the statement with respect to the pushing of the truck sideways, however, was sufficient to render the question entirely objectionable and the Court of Appeals felt that was sufficient answer to the error urged by petitioner.

When the question was finally put to Mr. Weiland, the respondents interposed an objection as follows:

> "Objected to for the reason that there is no proper or sufficient foundation laid for the introduction of such testimony. It is improper. It is invading the province of the Jury to determine these facts, and for the further reasons that the hypothetical question is not a correct resume of the testimony of the facts in this case up to this moment. It does not take into consideration the fact that the truck was driverless. There is no testimony in this record about whether the truck was coasting along the shoulder and then turned over into the barrow pit. There is no reflection in the hypothetical question of the fact that the driver of the bus had a shattered leg which he could not use on the brakes. There is a complete absence of all proper elements of a proper hypothetical question in this Court, and we object

for the reason there is no proper and sufficient foundation laid for the expression of an opinion by this witness." (R. p. 42)

There is no question that one of the respondents' basic objections to the hypothetical question was the inclusion therein of the manner in which the truck arrived at its resting place. This, among others, was urged by the respondents in the Court of Appeals as sufficient reason for sustaining the trial court's ruling on the proffered testimony. It is interesting to note that, prior to the filing of its Petition for Writ of Certiorari, the petitioner never complained that the respondents were raising this claimed objection to the hypothetical question for the first time in the Court of Appeals.

An examination of the record (R. pp. 37-44), clearly supports the trial court's ruling and the decision of the Court of Appeals for the Eighth Circuit in affirming that ruling with respect to the admissibility of this expert testimony.

It is certainly a recognized principle that all subjects are not proper subject matters for the testimony of an expert. And the mere fact that he may be eminently qualified in his field does not make admissible his testimony regarding facts which may be facts to be determined ultimately by the jury or which may be facts the jury can determine as well as an expert. As a matter of fact, this expert had never examined the scene of the collision or either of the vehicles involved and was relying entirely on what information he could gather from an examination of the photographs introduced into evidence (R. pp. 37-48; Appendix to Petition for Writ of Certiorari, pp. 9-10).

Under all of these circumstances, it is respectfully submitted that the petitioner has failed to present to this Court any reason under Point III which would justify this Court's granting said petition.

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CONCLUSION

It is respectfully submitted that there is no conflict between the decision of the United States Court of Appeals for the Eighth Circuit and the other circuits in determining the admissibility of Mr. Weiland's testimony and in the construction of the Nebraska statute relating to the duty of motor vehicle operators about to enter highways to bring their vehicles to a stop as near the right-of-way line as possible. There being no such conflict, it is respectfully submitted that no sound reason has been given this Court why the Petition for Writ of Certiorari should be granted and, therefore, it should be denied.

Respectfully submitted,

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